UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

IN RE: THE MATTER OF THE FINDINGS AND RECOMMENDATIONS OF GRAND JURY NO. 1, of June 1972 ) MISC. NO. 74-21

Wednesday, March 6, 1974

The above-entitled matter came on for hearing before THE HONORABLE CHIEF JUDGE JOHN J. SIRICA, at 10:00 a.m.

APPEARANCES:

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LEON JAWORSKI, Special Prosecutor
RICHARD BEN-VENISTE
JILL WINE VOLNER
PETER KRIENDLER
PHILIP A. LACOVARA
JOHN J. WILSON
FRANK STRICKLER

JAMES D. ST. CLAIR
RICHARD HAUSER
JOHN MC CAHILL
WILLIAM HUNDLEY
PLATO CACHERIS
PAUL MURPHY
SIDNEY DICKSTEIN

JACOB STEIN

JOHN DOAR
ALBERT JENNER

JOHN SHAY
KENNETH ADAMS

THOMAS GREEN

Transcript of Proceedings dtd Mar 6, 1974
re GRAND JURY REPORT & RECOMMENDATION
to House of Representatives.

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P R O C E E D I N G S

THE COURT: Good morning. Mr. St. Clair, are you ready? I'll hear you, sir.

MR. ST. CLAIR: Yes, Your Honor.

May it please the Court, I believe it appropriate and I think Your Honor expects me to speak on behalf of the President with respect to our views as to what if anything should be done regarding a certain report submitted to Your Honor by the Grand Jury. That report as I believe consists of two entities, a one or one and a half to two page writing plus a briefcase or other container containing apparently some articles of evidence.

Very frankly, if Your Honor please, directing my attention first to the two-page letter or report --

THE COURT: -- Can you speak louder, please?

MR. ST. CLAIR: Yes. Directing my attention first, if Your Honor please, we as indeed the Court has noticed press reports concerning its contents and we consider that there has been a serious breach in the Grand Jury secrecy and despite that however, and despite the fact that in our view at least there is a gross distortion of the facts in the public press regarding the contents of this letter. We nevertheless take the position that we do not have any recommendations to Your Honor regarding this letter. Whatever you decide to do with it is quite appropriate from our point of view. We do not want to

have any responsibility with respect to any actions that are taken that would impair or damage either the cases of the Government or of the defendants impending and future indictments before this or other sessions of this Court.

With respect to whatever it is, the briefcase full of materials, Your Honor as I perceive it will have to weigh conflicting interests regarding what should be done regarding it. I think in order for Your Honor to make a determination as to the proper disposition of that material I should inform you that the President has authorized and directed me to tell Mr. Dean on behalf of the House Committee that the President is prepared to turn over to the House Committee all of the material that he furnished to the Grand Jury without limitations and further, that he is prepared to answer written interrogatories and participate in an oral interview with regard to his answers if that is deemed necessary.

Therefore, if Your Honor please, we leave the matter in your hands since you are the person charged with the responsibility of treating fairly the parties who stand trial before you.

Thank you.

THE COURT: Thank you, Mr. St. Clair.

Have the attorneys for the defense consulted with regard to who is to speak first?

Mr. Wilson, do you want to speak first?

MR. WILSON: May it please the Court, as Your Honor knows my partner Frank Strickler and I represent the defendants in last Friday's indictment -- two of them -- Mr. Haldeman and Mr. Ehrlichman.

Having learned from the press that in the same instance when the Grand Jury handed down the indictment, handed down something which has been called a report, accompanied by a bulging briefcase and it has been established I think I may be permitted to say, in conferences that the two are interrelated.

Having no idea as to the contents of either of these documents or parcels my partner and I considered over the week-end in the selfish interest of our two clients as to whether it was proper for this action to have been taken by the Grand Jury. We still have no idea of the contents of either of the so-called two-page report nor of the contents of the briefcase.

We worked on Sunday and Monday morning to prepare a letter to Your Honor, copy of which seems now to be generally well known according to the news media.

THE COURT: Doesn't look like you can keep any secrets, does it?

MR. WILSON: I have given up hoping for it to tell you the truth, and that is one of the things I want to mention this morning after I discuss a couple of law points.

I would like to read my letter to Your Honor if you will permit me. It is dated March 4, addressed to Your Honor:

"Dear Chief Judge Sirica:

"As Mr. Stricklar and I have been told, when the Grand Jury returned an indictment last Friday against our clients and others, some kind of report was also presented by the Grand Jury accompanied by a 'bulging briefcase' handed up to by one of the prosecutors. Of course, we have no information as to the contents of the report or of the briefcase. All we do know is that this action of the Grand Jury overhangs the indictment of our clients, and thus we have a legal interest in writing you this letter."

We footnoted that paragraph with a reference to two cases, one from Judge Wainfeld, United States District Court for the Southern District of New York, and the other from the Sixth Circuit, Hammond v. Brown, affirming a more elaborate opinion in the District Court below. Both of which we think establishes a legal position of ourselves to speak to this problem.

I continue to read the letter, sir:

"The Grand Jury which acted last Friday is a regular Grand Jury, and according to the law and practice in the District of Columbia, has no power to do other than indict or ignore."

There is a footnote to that in which we cited to

Your Honor the beginning of this doctrine in the District of Columbia in 1911 in the case of Poston v. Washington, Alexandria and Mt. Vernon Railroad Company, 36 App. D.C. 359. I should add by way of interruption of my reading of this letter that with some lack of modesty I have kept abreast of both the civil and criminal law of the District of Columbia for the last 50 years and I think I can say to Your Honor something which Your Honor may already know, that I am unaware of any special report of a Grand Jury being received in this jurisdiction in at least the last 30 years. I have been searching for a decision which I thought was that of Judge Holding, but which one of the old colleagues of you and myself in the District Attorney's office, Charlene Murray who ran the Grand Jury told me it was Judge Proctor's decision and which struck down and expunged a report of a Grand Jury in the District of Columbia.

I want to say that I have not slept in this area and I have examined miscellaneous documents from the beginning of this Court in 1865 turning every page. I can't find it but it is burned in my memory and that of our contemporaries, that certainly since the instance which involved some District Judge, probably Judge Proctor, that to our knowledge no action of the Grand Jury other than to indict or ignore has ever been received by a Judge of this Court.

Turning back to the text:

"It (meaning the general grand jury) may not

make special reports. It cannot act under Sections 3331-2-3 of Title 18, United States Code."

Let me interrupt again because I may as well weave my argument in presentation into the reading of this letter with Your Honor's permission.

18 U.S. Code, Sections 3331-2-3 was part of this 1970 Act of Congress which established certain procedures for a special grand jury.

Now, this is a work of art -- special grand jury -- and I feel I can say to Your Honor without contradiction that the Grand Jury which returned this report to Your Honor last week is not a special grand jury in any legal sense of the word.

2) The 1970 Act with relation to special grand juries and extensions of their terms and so forth, provided for the handing up to the Court of special reports sometimes called presentments, which I don't like to use because I think that is an ambiguous term in the criminal law.

In any event, the 1970 Act was designed to deal with organized crime. I am perfectly aware of the evolution of statutes to fit future occurring situations. While it may have been induced by the interest of Congress to get at organized crime, I should not be surprised that some day it would be ruled that it applied in other situations.

In any event, it applies only in situations so far as

a public official is concerned with relation to an appointed public official.

Now, while the statute does not apply in this situation, the defendants, or some of them, are or were appointed public officials. I mention that only in passing.

I say to Your Honor with absolute sincerity the 1970 Act in no way may be invoked by Your Honor in this case.

Continuing with my letter:

"Whether our clients are targets of the report or of the accompanying contents of the briefcase is not our point. If they are even incidentally mentioned therein, or if the contents of the briefcase include excerpts from their testimony before the Grand Jury or documents relating to them, as well as to others, this extra judicial act prejudices our clients and should be expunged or returned to the Grand Jury with the Court's instructions that their act was wholly illegal and improper.

"Of course, we do not have to remind you that Rule 6(c) of the Federal Rules of Criminal Procedure permits the Court to disclose or cause disclosure of matters occurring before a Grand Jury only 'preliminary to or in connection with a judicial proceeding.'

"If the Court has any intention to act differently from what I suggest, I hope that you will give us ample

advance notice thereof, so that, if we are so advised, the matters may be presented to the Court of Appeals.

"Copies of this letter are being delivered to the Watargate Special Prosecutor and to counsel for the other indicted defendants."

May I say I am grateful to the Court for thie opportunity to present orally these views.

Now, eir, with respect to the question of the powers of the Grand Jury to make special reports, the panarama of the law upon this subject is that state law largely permits, but some Federal jurisdictions permit it. The closest of which is Judge Thompson in Baltimore, United States District Court for the District of Maryland, who in 315 F. Supp. Page 662 in 1970 in the case entitled In re: Grand Jury 1969 held and even went back to what he understood to be the common law on the subject, the right of a Grand Jury to make a special report.

I have learned from discussing with counsel in that case the vastitude of that decision and one reason one finds that before, no matter what Judge Thompson may have said about the principles of law involved, he ended up by stripping the special report of everything but what amounted to the naked averments of an indictment.

This was a situation where the United States Attorney in Baltimore refused to sign the indictment and the argument

was whether that presentment was a presentment adequate enough upon which to base a prosecution and was held not to be by the Fourth Circuit.

The opposition with respect to Judge Thompson with respect to some other jurisdictions, even Federal ones, is that they are not binding upon Your Honor. Unless I am sticking my neck out awfully far here I don't think that there will be a citation of an incident where this policy of the District of Columbia not to permit the filing of special reports by a Grand Jury be overcome. Thus, I believe even with the scarcity of authority Your Honor would have to overrule both reported precedents in the Poston case in 1911 and the uniform policy thereafter to receive and not to expunge this report.

As I said in our letter we are not making this point because we think we are a direct target of this package of documents. If I had to speculate -- and it is sheer speculation I assure you -- the very tape upon which my client, Mr. Haldeman, was indicted for perjury or at least a free translation or transcription thereof by the prosecutor is in that bag. If it isn't in that bag, I would like to be told it isn't in that bag.

Thus, we are confronted with the fact that harassed as we have been for the last nine months by publicity, and I am not lecturing the media, I love everyone of them, they are doing their job, but in doing their job we are held up to ridicule, we are convicted in the public eye. I commend to Your Honor's

reading last Monday's article by Tom Dowling in the Star. Any citizen of the District who read that could not possibly sit as a juror in this case. And I don't read the society page either but when I saw Tom Dowling who used to be a sports writer writing on the society page, my interest was perked. Then I found what he did was when he said our client, Mr. Ehrlichman, was the most eloquent political speaker he ever heard, this is one of these things where they kiss you on the face and stab you in the back, and he went on to say what a bunch of crooks we are.

Now here comes another occasion for publicity. We know that leaks are a part of life --

THE COURT: -- I found that out.

MR. WILSON: At least in the District of Columbia if not elsewhere. The Court's own private memorandum to his colleagues got pirated somehow.

Our letter which was supposed to be held in camera from 2:00 o'clock Monday afternoon until this morning was photographed on television last night.

MR. CHRISTOFFERSON: Your Honor, that letter was filed at your instructions in the record as Mr. Wilson's brief.

THE COURT: My law clerk just informed me it is filed in the record. You can't complain about that.

MR. WILSON: I can't complain, but I am very fond of him.

I kept my mouth shut and would not tell a reporter what was in the letter to save my life.

THE COURT: There isn't anything secret about it.

MR. WILSON: Mr. Christofferson, I am not criticizing you, I love you too much.

3) Now I read in this morning's paper what secrecy these documents will receive if they go up on the Hill. I know that the two counsel who represent the House Committee today are honorable gentlemen and I know when they say something is going to be kept secret they believe it is going to be kept secret and they are going to try to keep it secret. But there are more leaks in Washington than in the United States District Court House, they are in Congress. The travesty of having executive session as a committee of Congress only to have the members of the committee rush out into the hall after it is over with and give the press their version of what their clients said before them is a terrible commentary on secrecy and executive session in the Congress of the United States. The leaks up there are big enough to drive a truck through.

We saw it in the Irvin committee when we had staff meetings only to find them -- Your Honor has suffered even as much as we have -- we find the Grand Jury transcripts were leaked out of the Grand Jury --

THE COURT: -- I might say we have a rule of the Court which specifically says, since you talked about it,

it has irked me frankly, the first time since I have been Chief Judge it has happened at least, we couldn't have a confidential meeting where I had made suggestions, not ordering anything just suggestions based on my experience in handling so-called Watergate affairs which I thought I had a right to make to these Judges so they could get some idea as a result of a confidential memorandum or letter Mr. Jaworski sent to me and I thought our Judges ought to know about it.

Still, somebody -- I hope I find out who it is because his job wouldn't be worth a nickel, I am telling you, his or hers or whoever did it.

MR. WILSON: I am sure of that.

THE COURT: I am glad you gave me the opportunity, I don't know if you thought about it or not --

MR. WILSON: -- Don't hesitate to interrupt me.

THE COURT: To make matters worse, I also talked with the newspaper man and told him it was a confidential memorandum which undoubtedly he knew but that didn't do any good.

So I am proud of the report that I made, they can publish it on the front page of any paper in the country and I stand behind it because I thought it was a good summary of the problems involved in this litigation.

That is all I have to say about it.

MR. WILSON: I don't think I got any trial advantage out of it, I read it, too.

THE COURT: I had the nicest relationship with every member of the news media. Many of them I have gotten to know real well and I thought it was a very terrible thing to do under the situation that existed.

Let's proceed with your argument.

MR. WILSON: Well, you know you and I are vying for their honor, their affection, and I don't know who is running first right now but I am not going to condemn them for it, that is part of their business.

THE COURT: Listen, they are entitled to First Amendment rights like anybody else, like you or myself, but I am entitled to express my opinion, which I have.

MR. WILSON: I do say the macinery of investigative authorities broke down when they couldn't find out how Jack Anderson got transcripts out of the Grand Jury and thie same Grand Jury who could dig deep and indict nearly everybody in the Watergate case whose names were mentioned wasn't able to find out who passed that stolen transcript to Jack Anderson, and what compounded it was that when he returned them like a nice little boy he was forgiven and that is the end of it.

So I say that our chance for a fair trial here should not be compounded by any other events, and this is an event which will compound it.

Mr. Jenner handed me the little brochure this morning entitled, "Procedures for Handling Impeachment Inquiry Material";

and in it as I understand it, I haven't read it -- no disparagement to Mr. Jenner, but I am told by my partner it emphasizes secrecy, which I do not believe in.

So here our clients, on the eve of trial are going to have a medium for the continued exposure and treatment in the press and the other news media of our evidence, evidence pertaining to us and I am sure there is some of it in there, and I have not the slightest doubt about our right to have this grievance today.

Now, finally, let me speak to Your Honor's limited right to dispose of this report even if it should be a legally submitted report.

As I read from our letter, Rule 6(e) which is the restricting rule on the release of information from the Grand Jury, bridles the attache of the Grand Jury, does not bridle the witnesses any more as Your Honor knows; but if I may use the same word with the Court, bridles the Court, with regard to releasing it only with two situations, one of which doesn't apply here, if we wanted it for motions preliminary to or in connection with a judicial proceeding.

Now our good friends on the other side who have man power galore, gave us it at 5:00 o'clock last night and I am not complaining about this, we all do things in a hurry, what we used to call when we were in the District Attorney's office, a snow job of citations.

Their cases are not in point and they do not, if I could rely upon Mr. Strickler, and I have done it because he was up almost all night reading these cotton-picking cases as I would call them, he didn't come to grips with this problem of what is a judicial proceeding.

Now I am not afraid to face up to it because Your Honor is entitled to be informed of everything here to reach the right judgment in this case, and as I think I mentioned to Mr. Christofferson yesterday on the phone I suggested he look at Kilbourn v. Thompson, a case decided back in about 1880 or '90, which was a contempt of Congress case, probably the first one that was submitted although the writer of the opinion has his attention called to an earlier one which was probably not considered.

Kilbourn was summoned before a committee of Congress to produce records. Indeed, he didn't show up or produce records so he was arrested by Thompson who was a Marshal or Sergeant -at-Arms, I guess, and brought before the House -- this was a House committee -- for contempt of Congress. This was the first opportunity that the Supreme Court had to deal broadly even with the contempt powers of Congress. And they went back to the practice in England at the time of Henry III, followed the course of history with respect to the powers of the House of Commons which unlike its status today had certain appellate powers.

It is an interesting treatise upon the development of the history in England and does anyone good to read it if for no other reasons, for cultural purposes of which I get very little.

Anyway, after this scholarly discussion of this subject they said they weren't going to follow the British and went into the discussion of powers of the House and they left undecided but somewhat open the question of the power of the Congress by finding as later cases have done, that the committee had no power to make the inquiry which it did and thus it sustained the writ of habeas corpus is what it means by which Kilbourn got the matter into the Court.

In the course of that opinion it spoke about the powers of the House of Representatives which was the body that was involved in that particular transaction and because this was apparently the first time that this sort of thing had been presented. And incidentally, by way of dictum, it spoke of the Senate in an impeachment proceeding exercising judicial

4) power.

Now some of the attributes of the exercise of judicial power are the right to summon witnesses, the right to put them under oath, the right to require the production of documents and the like. These are attributes as well of many administrativ agencies in the District of Columbia today and my text is that the exercise of judicial power is not the gateway to the

formulation of judicial proceedings.

In other words, the proceedings -- and I am only speaking to impeachment because that is mentioned in a line on one of the pages by way of dictum in Kilbourn v. Thompson -- but a later case, a case involving one of our now deceased but highly beloved colleagues, Mr. William P. McCracken, points out the difference between the exercise of judicial power, for example in contempt cases in relation to a legislative function as distinguished from the exercise of judicial power in an essential judicial proceeding.

So I say, and I anticipate the gentlemen on the other side although they did not cite Kilbourn v. Thompson in their cases, they did cite a case which I want to cite to Your Honor which is Doe v. -- somebody that ends with berry --

MR. CHRISTOFFERSON: -- Rosenberry.

MR. WILSON: Rosenberry. I can't get ahead of you, can I?

This was a decision by Judge Hand in the Second Circuit involving a desire by a disbarment committee to obtain Grand Jury material.

THE COURT: Let me interrupt you a minute, Mr. Wilson.

Has it or has it not happened in the past when for instance the Internal Revenue requests certain information, certain information is usually forwarded to them from having been heard by the Grand Jury as evidence, through the

United States Attorney's office. That is affirmed, is it not?

MR. WILSON: If you say it has, I am not going to admit it.

THE COURT: I am asking you.

MR. WILSON: I have never done it, and certainly I would say now if my client would be investigated by the IRS, I would be standing right here where I am today opposing it, although it might remotely be preceding a judicial proceeding so that I realize that the House of Representatives as the charging body here may precede a bill of impeachment which goes to the Senate. It is not the proceeding or in connection with that I am concerned with, it is the generic term judicial proceeding which I say, and the reason I speak to this subject is not in any way I am trespassing upon the position or the prerogatives of the White House counsel. This material can only be going up to the Hill in relation to impeachment, it can't be contempt, it can't be to enact legislation.

THE COURT: Do you contend the words judicial proceeding as used in Rule 6(e) of Federal Rules of Procedure only relates to matters before a Court or might be pending before a Court, or let's say a quasi-judicial body like the FCC, ICC?

MR. WILSON: I wouldn't even be willing to concede a quasi-judicial body. I say definitely, I answer you categoricall it has to be a judicial proceeding. I would like to say an Article III Court, but of course there are courts under

Article I, too, but my point is it is a court in the real sense of the word, in my judgment, and that is what Judge Hand said in the Doe case in which he found that the Bar committee was an adjunct of the court and obtaining the information from the Grand Jury was preliminary to a judicial proceeding, i.e., a disbarment proceeding of a member of the Bar which is a judicial proceeding.

So I yield the floor, Your Honor.

THE COURT: Let me ask you something: How about a brief of a grievance committee of the Bar Association?

MR. WILSON: The same thing, the same thing as the New York grievance committee. This, as Your Honor knows, culminates -- this can culminate in a judicial proceeding of disbarment or suspension.

I am on record unequivocally on this point, Your Honor, that it must be an essentially judicial proceeding. As I started to say, I wanted to thank you for your patience. Your Honor will give either Mr. Strickler or me an opportunity to reply and I thank you again for this opportunity of appearing here.

THE COURT: Let me ask you this question: In one of the cases you cited, namely, the Application of United Electrical Radio and Machine Workers of America, et al. found in 111 F. Supp., Page 869, which was a decision by Judge Weinfeld of the Southern District of New York, he acknowledges, I believe, in that opinion in the Second Circuit at least, that 14 reports

had been filed without challenge before his decision.

Now, to your knowledge, have other judges followed his decision since it was rendered in 1953?

MR. WILSON: Let me answer you two ways, if I may. I want to answer your question. First, Judge Weinfeld was not cited by us with respect to the release of reports. It was cited by us to establish standing on our part. People who were not within the known perimeter of the report but yet probably were. I do not hesitate, as I said to you earlier, that some Federal jurisdictions are doing this. I also find, however, that Judge Weinfeld's decision disturbed Judge Thompson so much in the Baltimore case that he undertook to distinguish him.

If you can tell me what he was talking about when he distinguished him, I would be grateful to you.

THE COURT: All right.

MR. HUNDLEY: Judge Bryant cited Judge Weinfeld, 184 F. Supp. 38.

THE COURT: You mean who is now senior judge on the Fourth Circuit Court of Appeals?

MR. HUNDLEY: Yes, sir, he was the chief judge in the U. S. Circuit Court.

THE COURT: I think at this time I would like to hear from Mr. Doar or Mr. Jenner to get their position before we proceed to other defense counsel and then we will take a recess.

Good morning, Mr. Doar.

MR. DOAR: May it please the Court, I am John Doar, special counsel for the Committee on the Judiciary of the House of Representatives. With me this morning is Mr. Albert Jenner, who is special counsel to the Minority Judiciary Committee.

Mr. Jenner and I have responded to an invitation by the Court to be present this morning to advise the Court with respect to the impeachment inquiry now pending before the House of Representatives and to express our view to the Court with respect to the matter pending before it and to request the Court to deliver the material which the Grand Jury delivered to the Court last Friday to the Judiciary Committee of the House of Representatives.

With the Court's permission, after my remarks Mr. Jenner would like leave to address the Court as well.

First and by way of preliminary, Your Honor, the Judiciary Committee has directed us to respectfully advise the Court that we have not been authorized to appear as a party in this matter nor to suggest that we are submitting to the jurisdiction of the Court; but we do have the authority of the Committee to inform the Court as to our view of the relationship of the House of Representatives impeachment inquiry and the matter now before this Court.

5) As the Court well knows, the Constitution of the United States provides in Article I, Section 2, that the House of Representatives shall have the full power of impeachment.

Prior to November 15, 1973 a number of resolutions calling for the impeachment of President Richard M. Nixon were introduced in the House of Representatives and were referred by the Speaker of the House to the Committee on the Judiciary for consideration, investigation and report.

On February 6, 1974 the House of Representatives by a vote of 410 to 4 authorized and directed the Committee on the Judiciary to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States, to implement the authorization the House also provided for subpoena power in order to permit the Committee to secure all information it may deem necessary to such investigation.

We wish to advise the Court that the Committee on the Judiciary of the House of Representatives has implemented two important procedures respecting information the Committee deems necessary to its constitutional inquiry.

First, in securing that information especially from a member of another branch of the Federal Government, the Committee will follow the policy of respectfully asking for the information in a manner and in a spirit that invites and anticipates cooperation.

It is in that spirit that we are here today.

Second, the Committee has adopted procedures for

dealing with all material which it may receive by subpoena or otherwise in the course of its constitutional inquiry.

Under these procedures the Committee has provided for strict control of all materiel so as to insure the security and confidentiality of the material until such time as the Committee in the course of meeting its constitutional responsibility decides the material marshaled by the inquiry staff should be presented to the Committee for its consideration.

Now the matter before the Court is whether these certain materials which have been referred to daveloped by the Grand Jury and presented to the Court should be delivered to the House Judiciary Committee.

The Court has been asked to refuse to do this under the guise of its authority to protect the constitutional rights of the individuals under indictment.

We recognize that the rights of these defendants must be safeguarded but the material can be released to the House of Representatives with full awareness that action at a later date in this criminal proceeding may be required if the release so prejudiced the defendants that he cannot receive a fair trial.

THE COURT: What do you mean by that?

MR. DOAR: By that I mean if at a later time in the course of the impeachment inquiry if some of this material, we know not what it is, the House Judiciary Committee and House felt it was necessary in meeting its constitutional obligation

to release this as part of its report to the House to consider it as part of the hearing, that it was essential in the course of the impeachment process, that it is possible the defendant could argue that that publicity might have prejudiced his case and at that time the Court would consider that on the specifics of that particular circumstance and the Court would have a number of alternative ways to safeguard the rights of the defendant.

THE COURT: Let me ask you this question: Now I want to preface my remarks by saying when I propound a question to counsel it does not indicate how I am going to rule because I don't know myself, but has any discussion been had by the Judiciary Committee along these lines, having in mind their interest in seeing that all these defendants receive a fair trial according to the rules of evidence and the law in the case, having in mind the great interest in this case nationally and internationally, this case, as you know, is unprecedented in the history of our country, I think, but has it thought about the advisability at least feasibility, put it that way if you want, of delaying this matter until after this so-called cover-up trial has been tried? Let me ask you that question.

MR. DOAR: The House Judiciary Committee has not thought about that, Your Honor.

THE COURT: Don't you think they ought to think about that?

MR. DEAN: Your Honor, I am sure that the Judiciary Committee would consider any matter that was presented or raised to them. How they would determine it is something that I could not represent to you.

THE COURT: I feel strongly just as Mr. Wilson does, and I have been on the defense in hundreds of cases, I prosecuted hundreds of cases as Mr. Wilson has, that the question in my mind and one of the problems I am going to have in this case is this so-called pretrial publicity, particularly in the case which I expect to preside over.

The more we can do to give these defendants and every other defendant who might be charged in the future a fair trial, we should all try to do that.

Now I am not trying to direct the Committee or suggest to them anything, but it would seem to me that with the massive publicity this case has had throughout the country and the world that might be a consideration.

In other words, what harm would be done by say waiting until this case is tried and incidentally, the lawyers are preparing an order and it will be filed, I hope, within a couple days, I have selected a trial date in this case and they have all agreed to it for September 9th, shortly after Labor Day.

It just seems to me that this ought to be considered.

I have been a counsel to a congressional committee the same as you are and I know that these men up there on both sides,

Democrats and Republicans, are interested in seeing to it that the defendants get a fair trial. Now this is something I have been thinking about.

While I am on that subject, let me ask you this question: Should I decide that the Judiciary Committee should receive the material comprised in the Grand Jury report, what precaution do you say will be taken to prevent disclosure of that material beyond the Committee?

For example, undoubtedly you will have the assistance of secretaries, maybe law clerks, people, and as Mr. Wilson said, he hasn't accused anybody, but what assurance does this Court have or any other persons interested that whatever I would turn over to your Committee would be kept in the strictest of confidence until the proper time?

You can't guarantee it any more than I can guarantee what should not have happened the other day. But there is a very important issue before the American people. The question of a fair trial. All right.

MR. DOAR: If Your Honor please, with respect to the question of what assurances I can give to the Court with respect to confidentiality of this material, let me say this, that the House Judiciary Committee has adopted rules with respect to the security and confidentiality of that material.

Briefly, the rules are as follows: That the only persons that have access to that material on the Committee are

the Chairman and the ranking minority member.

With respect to access on the staff, Mr. Jenner and I under the direction of the Chairman and the ranking minority member have access.

We are bound and under a duty to establish the strictest rules with respect to the making of that material available to other members of the staff only when it is necessary in the course of our preparations.

These rules, in addition, the staff is under the strictest rules with respect to matters of procedure or substance that come before it in the course of this investigation.

Until such time as the counsel has marshaled the evidence and is prepared to go forward with a presentation to the Committee, no Committee member has access to the material in any way whatsoever.

At that time the Committee then decides under the rules of the House whether or not the proceedings would be open or closed.

I can say to the Court that I believe that while I can't guarantee these materials would not be someway leaked out of the inquiry staff, that every conceivable effort has been made, every thought given to safeguarding these materials so that they only become public when it is necessary for the Committee or the House to do it in meeting its constitutional responsibility.

I would like to also in further response to your question about delay, I would like to say to the Court that I think that the considered circumstances before the Court and the considerations involved are extraordinary in that the House of Representatives has before it and are now exercising an over-riding constitutional responsibility.

The solemn duty of the Judiciary Committee is to decide whether or not sufficient grounds exist for the House to impeach the President of the United States. In order to do this, the House and the House Committee are under obligation and commitment to act expeditiously in carrying out this constitution mandate. The Judiciary Committee should be entitled to make its recommendations to the House on the best information available. This includes the material considered by the Grand Jury, a constitutionally responsible body who studied the matter for a long number of months, the materials developed by the Grand Jury while not binding on the House clearly fall within the scope of the inquiry.

The constitutional provisions for impeaching of a president were adopted to resolve charges involving the most serious abuses of our constitutional form of government.

Whether or not the House receives the material, the impeachment process will go forward. If each Committee member, perhaps if each House member must vote without taking this material into account one way or the other without in any way

indicating what decision the Committee or the House might make, the House members, the entire country would experience an enormous feeling of incompleteness in a constitutional sense.

For this reason, Your Honor, because of the constitutional obligation, because of the authority of the Constitution, because of our tradition devoted to the rule of law that requires the judgment of the House in this proceeding, in this impeachment proceeding be based on the best information available.

It is for that reason the Judiciary Committee has authorized to respectfully request the Court to deliver to the Judiciary Committee the materials which the Grand Jury delivered to the Court last Friday when it returned its indictment.

Thank you.

THE COURT: Thank you.

MR. ST. CLAIR: May I respond briefly, Your Honor?

THE COURT: Yes.

MR. ST. CLAIR: I will not prolong my remarks but this is indeed an unusual case, standing before you as a representative of each of the three major branches of our Government.

If Your Honor please, the President would not be in favor of delaying the impeachment inquiry before the House of Representatives. Toward that end, as I said, at the very outset, without regard and with all due respect to this Court, I have been instructed to deliver to the House everything that

we have delivered to the Grand Jury for its consideration which no doubt includes a number of materials in that bag, although I don't know what is in the bag. And I say this with all due respect to Your Honor.

THE COURT: Let me ask a question -- go ahead.

MR. ST. CLAIR: In this sense, and I hope in many other senses, Mr. Doar and I I think stand together. I'm sorry, go ahead.

THE COURT: That's all right. Go ahead.

MR. ST. CLAIR: I finished that sentence.

THE COURT: If view of your remark that you are willing to cooperate and turn over certain materials, you don't know, of course, what is in the briefcase that was turned over to me, is there any need in your opinion for them to have this evidence except to be sure that they have everything that the Grand Jury considered and submitted to them?

MR. ST. CLAIR: I don't think there is, Your Honor. The matters before the Grand Jury involved a large number of people. I represent one individual holding an important office in this Government. I believe that the critical material necessary to the resolution of this problem will be furnished forthwith to the House of Representatives by order of the President of the United States.

THE COURT: I am glad that he has taken that position.

MR. ST. CLAIR: Now, if Your Honor please, I am not

intending and I do not, and specifically do not take a position with respect to what Your Honor should do. Your Honor has a different problem, a series of different problems before him. I do not in any way support nor do I feel that material are relevant to considerations involving my client, whether the House proceedings are a judicial proceeding or not, with all due respect to my learned brother, Mr. Wilson. As far as I am concerned his arguments involving as they relate to my client are totally irrelevant.

I hope I have made the position of the President clear to Your Honor.

THE COURT: You have. Thank you.

All right, Mr. Jenner, I think we'll hear from you and then we will take a recess.

MR. JENNER: Good morning, Your Honor.

If Your Honor pleases, I should like first to follow immediately the last comments of Mr. St. Clair and say to you as I listened to the learned argument of the distinguished Mr. Wilson it repeatedly occurred to me though the point he was making was well presented and sound and was irrelevant to the issue before Your Honor.

The issue before Your Honor is the first presented to any judicial officer of this country in now almost 200 years. No other judge in this country in a hundred and ninety-seven and a half years has had this matter before him. It is sui generis.

Now Mr. Wilson cited some statutes, all statutes is enacted by the Congress of the United States and also the Federal Criminal Rules, Civil Rules, Appellate Rules and other rules all enacted pursuant to enabling all acts enacted by Congress and all statutes of the Congress of the United States though they do not recite in fact the first clause of all statutes subject to the Constitution of the United States of America, We enact this particular statute.

And within that preliminary clause inherent in every statute is the provision of the Constitution of the United States that the President, Vice-President, all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors, and more importantly the House of Representatives shall have the sole power of impeachment.

An equal and coordinate branch of that which Your Honor is a distinguished juror. That is the issue before Your Honor. Your Honor does not have to overrule any of the cases cited by Mr. Wilson, or may have been cited by the distinguished Special Prosecutor, Mr. Jaworski, in the memorandum that is before you that we haven't seen. I don't suggest we need see it. I don't think we do as I don't think those are the issues before you.

However, Your Honor came into possession of the briefcase with the materials in it, in the first place criminal

Rule 6(e), its recital deals solely with, and I call Your Honor's attention if I may, although I know Your Honor has it in mind, both as a litigator and of course as distinguished Chief Judge: "Disclosure of matters occurring before the Grand Jury."

What Your Honor has with respect to the briefcase and its contents is not matters occurring before the Grand Jury, they are documents, and documents in this land of the rule of law when brought to the attention of a court or grand jury do not become by that fact alone not subject to disclosure. They are evidence. And the issue before Your Honor, ones that you have every day and every trial, is: Shall there be suppression of pertinent materials now in your possession from the House of Representatives of the United States of America, which the House of Representatives and its in turn representative, the House Judiciary Committee, has advised Mr. Dear and me to say to your Honor most respectfully that the Committee needs and desires and requests Your Honor for these materials in order for it to perform the pervading, dominant duty fixed in the Constitution of the United States that if when its jurisdiction is invoked by appropriate resolutions which have been lodged with the House and referred to the House Judiciary Committee for disposition to conduct a full, fair investigation and report then by the Committee to the House of Representatives.

There has been talk about individual rights in this case. Yes, fortunately our great Constitution seeks to protect

those rights but the Constitution also has in it the provision with respect to impeachment. To the extent that overriding provision may be accommodated with or the rights of a fair trial accommodated with that overriding provision, thatis a matter before Your Honor.

Now, Your Honor is quite properly concerned. We appreciated the questions that you put to Mr. Dear. The rights of an individual to a fair trial in this context before Your Honor is a consideration of whether Your Honor may select from a venire after processing that venire for excuses for causa, sufficient causa of a venire from which you may select a petite jury for trial. That is the decision of course for Your Honor to make at the time or immediately before trial, and there are various ways that YourHonor can protect. Your Honor may postpone the trial. Your Honor may change the place of trial. Your Honor may reach the conclusion when you question the venire members closely that you can select 12 with the addition of the four or six alternates who are fair and impartial.

His Honor, Judge Gagliardi, in the Southern District of New York has proceeded to do that efficiently, fairly and honorably for the judiciary and for the Constitution of the United States which you in turn, Your Honor, will do.

The accommodation, the House of Representatives, it having been invoked to conduct an impeachment investigation that is fair to the President of the United States, be he

Richard M. Nixon or any other president, it is the presidency of the United States of America, the people of this country.

May I say that Your Honor I believe may take absolute judicial notice of this fact, the people of the country are very anxious and pressing that the House of Representatives and the House Judiciary Committee proceed with all possible deliberat speed with this investigation.

Your Honor has the suit case, whatever it might be. We don't know its contents. We are led to believe just by osmosis, if nothing else, we do not represent that we have been advised by anybody indirectly or directly what a single document is in that suit case, that it comes within the duty of the House Judiciary Committee in performing or discharging its constitutional duty at least to examine, to see maybe that suit case is empty, empty in the sense that there is nothing in it that is pertinent to the duty and obligation and discharge by the House Judiciary Committee of that duty. And even if Your Honor, with tremendous respect to you, you are a citizen, the House of Representatives honors and respects you as an officer of a Court and branch, but however, Your Honor came in possession of these documents -- be they documents -- it is the position of Mr. Doar and myself in suggesting respectfully to you that whether you be a citizen or you are a judicial officer of a great division of this Government, there is a responsibility of all citizens of the United States of America to aid and assist

the House of Representatives in discharging its overall pervading dominant constitutional duty and responsibility which it is processing with responsibly.

Thank you, Your Honor.

THE COURT: Mr. Jenner, I am fully aware and conscious of what my responsibilities are not only as a citizen but as a Judge of this great Court of ours, a member of the Federal judiciary, and I have taken all these things into consideration and this matter concerns very very important questions of law which have been discussed pro and con.

Now, before we recess, this question may have been answered by another attorney, but in your view what bearing does Rule 6(e) of the Federal Rules of Criminal Procedure have on this matter? I would like to hear your discussion on that. Undoubtedly you have given it considerable thought.

MR. JENNER: Yes, we have given it considerable thought, Your Honor, thank you.

I will seek to articulate correctly, I hope, by my response.

That Rule 6(e) as I said by way of incident in the course of my argument to Your Honor deals with matters occurring before the Grand Jury not with documents that have been tendered to the Grand Jury or in possession of the Special Prosecutor and have been discussed by him in the Grand Jury.

What Rule 6(e) is designed to direct is while the

Grand Jury is in session that those who may be subject to the reach of the Grand Jury are protected from unfavorable dissemination at large of matters before the Grand Jury. Also to protect the members of the Grand Jury from possible insidious influence by outside people who might seek to influence the Grand Jury.

The authorities with respect to the functioning of Rule 6(e) are in conflict as Mr. Wilson has generously conceded but my point is that Rule 6(e) does not come into play with respect to the House of Representatives of the United States in exercising as the Constitution says, the sole and only power of impeachment provided in the Constitution of the United States and that body and that body alone.

Whether Your Honor is in possession in your official capacity or you just happen to receive those documents, there is an obligation. It is a respectful, Your Honor, in the sense I use the word obligation, I am using it respectfully, that these documents be lodged with the House of Representatives.

I don't think Rule 6(e) has any application whatsoever in the proceedings before you nor currently does the statute or the cases cited by Mr. Wilson in his letter. Assuming he is correct arguendo, and I suggest that he is not, but assuming he is correct arguendo on the power of the Grand Jury -- it is all immaterial because Your Honor has the documents before you, and you are in possession of them and that is the key issue. How you came in possession is not relevant and whether the

Grand Jury properly placed them with you is irrelevant. Your Honor does have them and it is our position under the Constitution of the United States the House of Representatives needs and should have them.

Thank you.

THE COURT: Thank you.

Mr. Wilson, I would like to put this question to you, a hypothetical set of facts: Let's assume, and thank God we have only had three or four maybe not that many Federal Judges since the Federal Judiciary Act was enacted out of the hundreds of Federal Judges who serve throughout the Federal Judiciary, let's assume this set of facts: There has been a Grand Jury investigation of some alleged misconduct on the part of a certain Federal Judge and the House Committee, the Judiciary Committee receives certain information as a result of that information resolution was passed or adopted recommending the matter be considered by the House Judiciary Committee.

Suppose the argument was made in that case by the attorney for the Federal Judge, we'll say, and after the Grand Jury came in with a report, indictment, presentment, they couldn't turn that material over to the House Committee because they proceeded beyond their duties, powers and jurisdiction.

Would you say under these conditions that the House Committee would be barred from getting that evidence and material? I put that question to you.

MR. WILSON: You said this is hypothetical? You are not holding a book back on me, are you?

THE COURT: No.

MR. WILSON: I think this case, Your Honor, if I follow your track, my answer would be what I said to Your Honor before, although I have a considerable to say to the gentlemen from the Hill.

THE COURT: All right. We will take a 15-minute recess. Thank you.

(Recessed at 11:25 a.m.)

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THE COURT: Does any other counsel for a Defendant wish to argue now?

MR. HUNDLEY: Your Honor, if I might suggest, I think it might be more helpful to defense counsel, who have only a peripheral standing on this matter anyway, if we heard what Mr. Jaworski's position was, how far he feels this report ought to go. Perhaps he agrees with Mr. Wilson and that would short-circuit a lot of problems here.

THE COURT: It doesn't make any difference to me.

Mr. Jaworski.

MR. JAWORSKI: May it please Your Honor, if it pleases you, we are prepared to proceed. Mr. Lacovara will present the argument.

THE COURT: We usually hear from all the defense first and the Government on rebuttal. It doesn't make any difference to me. You gentlemen handle it the way you wish.

MR. HUNDLEY: I will be very brief.

THE COURT: Suppose you make your statement.

MR. HUNDLEY: Yes.

As the Court knows, I represent Mr. Mitchell in this matter. I am really not prepared to make any full-fledged argument to the Court for the simple reason that I don't know what is in the report; and, of course, what is in the report would dictate what the argument should be.

I would say this: That if there is anything in the

report that pertains to Mr. Mitchell, I would ask this Court to expunge that from the report.

On general principles, I agree with Mr. Wilson. If the report does create some sort of a problem of the nature that he indicates then, of course, I think it was an illegal act on the part of the grand jury. I think it would be improper for me, as Mr. Mitchell's counsel, to even look at the report. I think that if Your Honor did anything further than expunge the full report, assuming it is of that nature, then Your Honor would only be, in a sense, compounding the illegality of the criminal action.

Since I only represent Mr. Mitchell, my only concern would be as to his right to a fair trial here, that if there is anything at all in the report concerning Mr. Mitchell, either directly or indirectly, that that, of course, should be expunged.

Let me add this one other note, again only confining myself to my client, Mr. Mitchell.

If the suitcase contains documents -- we have had a situation in New York where Judge Gagliardi has turned over certain information to our counsel as being Brady material, as having some exculpatory value to the defense.

Again Your Honor realizes I am talking in a complete vacuum here, because I don't know what is in the report.

If any of the material in the suitcase is of that

nature, then, of course, it is evidence and it is evidence that should only be made available to me and my client, and should not be turned over to the Committee.

I noticed with some interest that Your Honor addressed a question to Mr. Wilson, asking if there were any other judges who had followed Judge Weinfeld's very erudite and scholarly opinion in New York on that matter.

There was a proceeding before Judge Bryan when Judge Bryan was the Chief Judge in Alexandria, in the matter of Petition for Disclosure of Evidence before the October 1959 Grand Jury of this Court. In that opinion, Judge Bryan cites Judge Weinfeld with favor; and specifically points out that there has to be rigid restraints upon these grand jury presentments or reports, or whatever you might want to call them, to avoid obtrusion upon the spheres of the Legislative and Executive branches of the Government.

He drew the line, just as did Judge Weinfeld in that case. The citation is 184 F. Supp. 38. In that case Judge Bryan made the presentment available only to the local Commonwealth attorney, again on the theory that that could be preliminary to a judicial proceeding. He felt that Rule 6(e) did not confine the judicial proceeding to only a Federal judicial proceeding, but that is where Judge Bryan drew the line. And in the cases that I have looked over, I don't see that any judge has gone beyond that point.

So, as I say, in speaking for Mr. Mitchell, my sole concern would be that if anything in the report pertained to him in any way, I would ask this Honorable Court to expunge it.

Thank you, Your Honor.

THE COURT: Thank you.

All right, next?

Mr. Green.

MR. GREEN: If Your Honor please, Thomas Green on behalf of Defendant Mardian.

My only purpose in addressing the Court this morning is to preserve the objection that I made yesterday in our session, that any release of the report would create undesirable and unwarranted pretrial publicity. I think that is evidenced by the congregation assembled here this morning.

I am handicapped to go further, as are probably all defense counsel, without knowing what is in the report, to make any more specific my objections.

One short response to something Mr. Jenner said about Rule 6(e).

My recollection of the grand jury practice was simply that when documents are taken before the grand jury, they are frequently read to the grand jurors; they become part of the transcribed record, if the record is indeed recorded and later transcribed.

That falls directly within the language of Rule 6(e), which forbids recorded testimony from being disclosed other than in connection with a judicial proceeding.

Furthermore, I think to take the position here -- when we all know that in many cases before grand juries, the evidence is presented purely by documents, with maybe a custodian to introduce the records and an agent to read them to the grand jurors -- and to now state that Rule 6(e) doesn't cover such a case because that kind of documentary presentation is not a matter before the grand jury, with all due respect, I think is to engage in mental gymnastics.

I think the rule is clear and must be interpreted in a reasonable manner.

Thank you.

THE COURT: Thank you, Mr. Green.

MR. DICKSTEIN: May it please the Court, my name is Sidney Dickstein and I represent Charles W. Colson, Defendant, in Criminal No. 74-110.

I think it is fair to assume from the fact that I have been invited to appear before Your Honor on this matter this morning that this matter touches upon the interests of my client.

However, I do not know what is in the report that has been discussed today. I do not know what is in the accompanying briefcase. I do understand that the Special Prosecutor's

Office has submitted a memorandum to Your Honor. We do not know the content of that memorandum; and as far as we are concerned, it is an ex-parte communication to us.

As tempting as it is, we will refrain from engaging in what has been America's favorite guessing game for the past week or so. We will not make any assumptions whatever as to the content of the memorandum of the grand jury, if, indeed, that is what it is, the accompanying briefcase, or the memorandum submitted by Mr. Jaworski.

Since we are not in a position to know what the content or the nature of this material is, we will also refrain from taking any position before Your Honor as to what disposition should be made with regard to this material.

I would, however, wish to express my concern as to what the consequence of the disclosure could or might be. I believe it was Mr. Doar who indicated to Your Honor that he could not absolutely guarantee the privacy of this material, the control of this material; and in view of the history of what has happened to statements and documents which have been in the possession of members of the Congress and Congressional Committees during the pre-indictment phase of these proceedings, I can well understand Mr. Doar's reticence.

We just wish to state this, Your Honor: That whatever Your Honor decides to do with respect to this material, we do not acquiesce in it; we do not waive any rights that may flow

as a consequence of the disclosure or dissemination, if that is Your Honor's decision.

That is our position today.

THE COURT: Thankyou, Mr. Dickstein.

MR. BRAY: Good morning, Your Honor. I am John Bray, representing Gordon Strachan.

Mr. Strachan, of course, appeared as a witness before the grand jury that handed up the document in issue and he has also been indicted by it.

I mightnote that from the newspaper reports it appears that that grand jury is still in session. As I indicated in the meeting we had yesterday, it was my view that even if a regular grand jury has the authority to issue any sort of a traditional presentment, and if this grand jury otherwise at the time of this document was a legal grand jury, that under no circumstances could the grand jury return a presentment while the grand jury remains in session.

I refer the Court to a Second Circuit case, In re Bonano.

THE COURT: Have you filed a memorandum?

MR. BRAY: No, Your Honor, I haven't, but I can give the citation.

THE COURT: Give me the citation.

MR. BRAY: In re Bonano, 344 F. 2d 830; and at Page 834 the Court said:

"We have not been referred to a single case authorizing disclosure of a witness' testimony during the pendency of grand jury investigations."

Now, we, of course, don't know whether the briefcase contains testimony, but I think the Supreme Court cases also have indicated that grand jury material disclosures in general must in any event, if proper in the interests of justice, await termination of the grand jury.

Therefore, in the event the Court otherwise decides that this information should be disclosed because of a compelling public need, it is my request, among others, that the grand jury immediately be terminated.

Furthermore, I would like to mention, with respect to the question whether under the Federal Rules of Criminal Procedure the House proceeding constitutes a judicial proceeding, such that a grand jury may transmit information to it upon order of the Court, that the case that Mr. Wilson referred Your Honor to, Kilbourn v. Thompson, while, as Mr. Wilson said, it does throughout speak of the House of Representatives having judicial powers, in my reading of that decision, they were talking about something quite entirely different from Rule 6(e), as to whether or not that is then a judicial proceeding.

In one portion of the opinion, and I think perhaps the only portion where the term, judicial proceeding, rather than

judicial powers is mention, is on Page 387 of the opinion, where the Court specifically seemed to have withheld judgment whether the House of Representatives in matters like this was vested with judicial powers and as such constituted a judicial proceeding. With respect to the term, judicial proceeding, the Court raised the question whether if this had been done, that is, if they had clothed themselves with the power of a judicial proceeding, whether that might not in fact violate the separation of powers of our Constitution.

Your Honor, with respect to the rights of the Defendant, Mr. Strachan, I do want to note my objection to any disclosure of whatever might be in the report or in the brief-case, both in his status as a witness before the grand jury and in his status here as a Defendant.

I furthermore would like to note with respect to the possibility of fair trial, which is everyone's pointed concern here today, that we are doing this on the heels of what has already been probably the most massive disseminated amount of publicity in this country's history; and I believe that it is particularly appropriate to realize, as Judge Gesell realized in a recent tapes case, in the suit by the Senate Select Committee for disclosure of tapes, that, as he put it:

> "A critical factor in the whole decision as to the weighing of the various interests involved here is this fair trial question."

He noted that even the disclosre of those tapes that may perhaps be wholly unrelated to many of these Defendants could generate a whole new round of additional publicity.

I note, although we come before the Special Prosecutor's office, I do have the impression that the disclosure of this information at loast to the House is sought by the Special Prosecutor's office and, therefore, if this is done, if it does create the kind of publicity we fear, this most clearly would be Government-generated publicity.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Bray.

Anyone else?

Mr. Stein.

MR. STEIN: If the Court please, my name is Jacob A. Stein and I represent Kenneth W. Parkinson in Criminal No.74-110.

On behalf of my client, I object to the making public of the grand jury materials. The gratuitous introduction of the materials into public discussion will serve to sustain the swirl of pretrial publicity.

I also object to the materials being transmitted to a Committee of Congress. To do so increases the risk of public disclosure and creates the possibility and perhaps the likelihood of an intertwining of the grand jury materials with the Committee's action.

Your Honor has entered an order promulgated in the interest of controlling pretrial publicity; and it deals with comments by counsel and the Defendants. I question whether it would conform and be compatible with the spirit of that order to place these materials in a position where the public can get at them.

I move, therefore, that the materials be held in camera and protected from any further disclosure even to those who promise confidentiality.

As a footnote, Your Honor, neither I nor my client knows what the contents of these materials are and we have no reason to believe that they would affect our position on the facts in any trial; but we do fear that we are going to be thrown further into a vortex that is well-nigh unctrollable at this point.

Thank you, Your Honor.

THE COURT: Does that conclude all the attorneys representing the various Defendants?

Mr. Lacovara.

MR. LACOVARA: Good Morning, Your Honor. Philip Lacovara, counsel for the Special Prosecutor. I am appearing this morning on behalf of the United States and the grand jury.

It is our submission, Your Honor, on behalf of the Government and the grand jury, that the Court has the power

to receive the report and recommendation which was handed up by the foreman last Friday; and that in the circumstances of this matter, the Court should exercise its power and discretion to grand the grand jury's request.

I would like to make one or two preliminary points about the status of the information in this area.

As several counsel have observed, the Special Prosecutor's office did file with the Court yesterday a memorandum of points and authorities expressing this position. That memorandum was available to be served on all counsel at the meeting of counsel in camera yesterday but the Court decided that because the memorandum did discuss in a very general way the contents of the report, that it would be appropriate to place it under seal for the time being, pending the hearing this morning.

We did, at Mr. Wilson's request, furnish him with a list of all of the authorities cited in that memorandum. I find myself in the unusual position of being charged with having given defense counsel too many citations rather than too few.

THE COURT: Isn't it the fact that Government counsel, Mr. Jaworski, requested that it be filed under seal?

MR. LACOVARA: I am not sure, Your Honor. I wasn't present at the meeting myself.

MR. JAWORSKI: That is correct, Your Honor.

THE COURT: That is correct. I just wanted it clear on the record.

MR. LACOVARA: The reason for that was that the Government, as the Court will understand, does feel it necessary to discuss some of the issues in the context of this report and recommendation.

The additional point that I shuld make is that it is true, as we understand it, that no counsel for the Defendants -- who are the objecting parties here this morning -- have seen the two-page report and recommendaton. It is our understanding that counsel for the President has been granted access, without objection, to that two-page memorandum.

MR. St. CLAIR: I confirm that, as Your Honor knows.

THE COURT: Thank you.

MR. LACOVARA: The situation is this, Your Honor: The grand jury, in the exercise of what it believes to be its lawful powers as a regular grand jury --

THE COURT: I would like to speak to counsel at the bench a minute, if you don't mind. Both sides.

Excuse me, I didn't meant to interrupt you. I have something I would like to discuss with you at this point.

(Whereupon counsel approached the bench and the following proceedings were held:)

MR. LACOVARA: I would like to make a motion that our memorandum be unsealed, if that is permissible.

THE COURT: I wanted to talk to you about this.

A lot of people are going to be wondering, and rightly so, I think. Mr. St.Clair saw this, and the implication might be: Well, the Judge didn't let the other Defendants' counsel see it. What is wrong here?

Do you understand? I would like to have some kind of agreement among counsel that certain attorneys wanted to see it and there was some objection. The Court was willing to let them see it, but Mr. Wilson has to protect his record.

MR. WILSON: I am sorry that Mr. Lacovara mentioned that the White House had seen it. It was in camera. I thought that was part of our confidential session. I am not blaming Phil. Mr. St. Clair confirmed it. I haven't told anybody this.

THE COURT: Yesterday we did discuss that. You were not there. You see why I am concerned.

MR. St.CLAIR: I would initially have let all defense counsel see it.

MR. DICKSTEIN: Your Honor, there is an additional problem. We are in the blind. We don't know, because we haven't seen it, whether this two-page memorandum, without the supporting accompanying documents, if indeed they are supporting accompanying documents, has any meaning.

THE COURT: I understand.

Mr. Jaworski.

MR. JAWORSKI: If I may comment on that. As I did yesterday, I, personally, feel that the memorandum is of such a nature of a transmittal letter as to make it entirely appropriate for it to be made public, not only for counsel to see it. You remember I took that position in camera yesterday; and I take that position again now.

THE COURT: Mr. Wilson is protected on the record if you have any substantial objection to it; but I would like to see that memorandum made public, especially in view of the position taken by the President here.

MR. WILSON: Your Honor, if you should rule today by consent of ninety per cent of the people here that that may be read aloud in this proceeding today, you don't give me my twenty-four hours to raise the question in the Court of Appeals.

THE COURT: You can raise it.

MR. WILSON: After it is open.

THE COURT: If I decide against you -- if I should; I don't know what I am going to do -- you still have a right of appeal.

MR. WILSON: No, but on this point I say the grand jury had no right to hand in two pages, much less the bundle. If you are going by consent of other counsel to read those two pages, you have taken away from me an appellate base.

THE COURT: I see your point.

Suppose we do this: Suppose we finish the argument,

the legal argument.

MR. WILSON: You may decide in our favor, but the thing is over with.

THE COURT: Right. You can't tell.

What I think I will do, out of an abundance of caution here, is to give you the twenty-four hours to apply to the Court of Appeals, Petition of Prohibition, or whatever you want to file, and let them decide the matter.

MR. St. CLAIR: The President, if Your Honor please, stands indifferent, as I said at the outset. It is up to you.

THE COURT: The President doesn't take any position on that.

I think the two pages ought to be made public. I have read it.

MR. STRICKLER: Your Honor, if I may interrupt, if they are made public, the reason for making them public is to eliminate further unfair speculation. Now, the speculation is going to continue with respect to the bundle in the briefcase; and I don't think it is going to eliminate any speculation.

THE COURT: That is a different subject matter. Those of us who have seen the two pages know what they contain, and standing by itself, I think there is great public interest in this.

I know what is going to happen. There will be people saying: Well, the Judge let so-and-so see it, counsel for the President; and didn't let the others see it. Is this fair?

MR. LACOVARA: It would be important to put on the record that defense counsel were offered the opportunity to see it.

MR. WILSON: You can say we declined to look at it. I don't know whether other counsel will say that but we decline.

THE COURT: Can I put on the record it was offered, you declined to look at it, but other counsel wanted to look at it?

MR. BRAY: We indicated hypothetically, if we were given the opportunity of looking at the released memorandum, we would prefer to see it; but I don't think we were offered the opportunity.

THE COURT: You didn't want to see it.

MR. HUNDLEY: I took the position unless there was something in it pertaining to Mr. Mitchell, I am not sure I have the right to take a look at it.

THE COURT: Why can't I say this: At least we can agree to this without naming names. That the so-called two-page memorandum or order or whatever it is was offered -- I won't have to mention names of counsel -- by the Court for the attorneys to look at it; and it was decoined by certain defense

counsel and approved by others. So that that is the reason it has not been disclosed. We can let it go at that.

MR. WILSON: I think you should add the others haven't seen it yet. Isn't that right?

MR. HUNDLEY: Nobody has seen it yet.

THE COURT: You can write the statement out, if you wish.

MR. HUNDLEY: That is all right.

THE COURT: I want the record to show I offered to permit counsel to see it. I am not going to name any names. Certain of the defense counsel didn't want to see it; others wanted to see it. So nobody will be under any misapprehension.

MR. DICKSTEIN: The record will stand as to what the positions of respective counsel were; but lest there be some misunderstanding, it was stated, I am not sure as a hypothetical, that ninety per cent of the defense counsel might agree with the proposition that the memorandum should be disclosed to the public.

Speaking for Mr. Colson, I know that was not our position.

MR. WILSON: I said, if.

THE COURT: This is very important, gentlemen. We don't have to rush this. I would suggest that you legal minds get together and prepare a statement that is fair to everybody and when we come back from lunch, the statement will be all

settled and I will read it, so there won't be any misunderstanding by anybody.

MR. WILSON: All right.

THE COURT: That is the way to do it.

MR. HUNDLEY: All right.

THE COURT: I don't want tostart ad-libbing. If I make a misstatement, you will jump up and object, and this one will object.

MR. GREEN: Would you contemplate an adjournment now?

MR. HUNDLEY: Could you let him finish?

THE COURT: Oh, surely.

MR. WILSON: We would like to masticate at lunch what he said.

THE COURT: We will take a little longer lunchhour, if you want, so you can get together in the room and agree upon a statement. You don't have to mention names.

MR. HUNDLEY: We will agree.

MR. DICKSTEIN: Thank you.

(Whereupon counsel resumed their places and the following proceedings were held:)

THE COURT: Pardon the interruption, Mr. Lacovara.

Let's proceed.

MR. LACOVARA: Thank you, Your Honor.

The two basic propositions that we would advance to the Court this morning -- and as I listened to the arguments, I

am not sure that at least the first one is seriously in dispute -- are these:

First, that a regular Federal grand jury does have the inherent constitutional power to submit to the Court that impanels it something other than merely an indictment and a no-true bill.

In fact, Mr. Wilson's argument, as I understand it, and I hope I am doing justice to it, recognizes that Federal courts and Federal grand juries around the country do in fact have a practive of receiving such reports.

We think it is significant that even in this Circuit, in the most recent authoritative decision by the Court of Appeals on the procedure to be followed by Federal grand juries the Gaither case, in 1969, with which every District Judge and prosecutor is familiar, the Court of Appeals for this Circuit stated that grand juries, regular grand juries, even today, in the language of the Court, "have the power to return presentments to the Court, even if those presentments do not constitute an indictment."

THE COURT: Here is what that case said, taking an excerpt out of the opinion in the Gaither case you mentioned, 413 F. 2d 1061:

"Even today grand juries may investigate, call witnesses and make a presentment charging a crime. However, the presentment, even if

otherwise an adequate charge, cannot serve as an indictment and hence initiate a prosecution under the Federal Rules of Criminal Procedure until approved by United States Attorney."

That was one of the questions they had. That is the language of the Court of Appeals in that case.

All right, you may go ahead.

MR. LACOVARA: That is correct.

From reading that decision, you no doubt saw the citation that this Court of Appeals gave to the Fifth Circuit's en banc decision in the United States v. Cox, where this issue was in dispute; and the majority of judges on the Fifth Circuit stated that the grand jury had the right to return in open court, even prior to its discharge -- which was a point raised by one of defense counsel -- some sort of accusatory document that did not constitute an indictment in that case because the United States Attorney refused to give it the substance of an indictment by signing it.

The Cox decision and the Gaither citation to it were also at the heart of Chief Judge Roszel Thomsen's decision up in the District Court in Baltimore to permit the very same kind of activity to take place.

That grand jury before it was discharged and before it had completed all of its business announced that it wanted to make a report to the Court in the nature of a presentment

accusing certain individuals of misconduct, nameing other persons who were not allegedly involved in misconduct but had in fact been targets of misconduct. Relying on the Fifth Circuit extensive analysis of the common law powers of a Federal grand jury, codified by the Constitution, Judge Thomsen held that Federal grand juries do have the constitutional power to decide the form in which they will report back to the court on the results of their investigations. Judge Thomsen, therefore, received that report and, in fact, filed publicly a summary of the charges that the grand jury had returned, even though they did not constitute an indictment.

The other forms of grand jury reports that have been approved by other Federal Courts are also significant.

The type that I have just referred to as reflected in Cox and in the 1970 decision of Judge Roszel Thomsen are reports by Federal grand juries commenting on general matters of public concern.

Just a few months ago the Court of Appeals for the Fifth Circuit, after noting the considerable historical data supporting the notion that regular Federal grand juries have the power to make reports and not simply to indict or stand mute, allowed such a report or portions of it which the court found related to a Federal interest to remain on the public record.

That was only a few months ago, Your Honor. It is the

latest decision of which we are aware.

As counsel for Mr. Mitchell has stated, Chief Judge Bryan, now a Senior Judge of the Court of Appeals, held in a very similar case some years ago in the Eastern District of Virginia that it was, in his language, wholly proper for that Federal grand jury to recommend to the court that it make available the evidence that grand jury had heard to other government officials, there, prosecuting officials of the State of Virginia, and the Court did, in fact, grant the grand jury's request, with the caveat and caution to the local prosecutors that they try and use the information as far as practicable so as to minimize any impact on the Federal criminal proceedings which were then pending.

It is my inderstanding that in this case, as well as in Judge Thomsen's decision in Maryland, the grand jury had not been discharged and had not yet completed all of its business at the time it returned that report and requested the transmission of the evidence.

I might point out in that context that this grand jury, the June 5, 1972 grand jury of this Court, has returned an indictment and in a sense, although the grand jury has not been discharged and although it does have some business or may have some business before it, it has not acted before the return of a formal indictment, naming the movants whose counsel are here this morning to object to the receipt of that report

and the honoring of that recommendation.

We think that demonstrates rather clearly, Your Honor, that as a matter of constitutional power, this grand jury was acting within the scope of its lawful authority.

Counsel have raised a question of practice in the District of Columbia and have suggested that sine 1911, at least it has been the practice of the District of Columbia not to receive reports of that sort.

I am not, personally, familiar with that practice. I will accept counsel's representation that it has not been the practice -- and I underscore that word, practice -- of grand juries in this District to return such reports.

Nothing in the case cited by counsel for Messrs. Haldeman and Ehrlichman, however, supports the notion that the Court of Appeals for this Circuit has forbidden the development of such a practice; nor is it fair to argue in this case that allowing this grand jury to submit this kind of report in this over-all setting would betoken the advent of an undesirable practice.

What seems to have been lost sight of at some point in the arguments this morning is that we are dealing with an unprecedented situation, Your Honor. This is the first time in over a hundred years that the country has been faced with the prospect of an impeachment investigation, trying to

determing whether there are gounds for impeaching the President of the United States.

As the Court well knows, this grand jury has been investigating matters and has returned an indictment which seemed to hear on that question. We helieve it would be unthinkable under our system of Government for this Court or any court to hold that this grand jury must remain mute when it feels it has heard evidence which is material to that question.

There is no attempt here, as Your Honor knows, to intrude upon the responsibilities of any other branch. The Court is familiar with the nature of this particular report and can determine that there is no usurpation intended or worked hy this grand jury.

The 1911 decision by the Court of Appeals in the Poston case, on which counsel have relied, involved not the practice of a Federal grand jury in the District of Columbia or, indeed, Federal grand juries anywhere else. That case involved only the question whether the return of a very critical, malicious, it was alleged, report by a state grand jury in Virginia violated Virginia rules on the proper scope of grand jury activity. The Court simply held that there was no privilege in a libel suit for wilful causing of the circulation of that report.

I come back to the Gaither case, Your Honor, which

in light of the intervening developments in Federal Courts has expressly stated in this Circuit that Federal grand juries do have the power to return accusatory presentments, even though, as the Court will be able to determine, that is not what is at issue in this case.

Counsel have also suggested that the Organized Crime Control Act of 1970, which does provide certain procedures by which a new institution, a special grand jury can provide reports on organized crime conditions or public corruption conditions, somehow implies that regular grand juries -- the grand jury whom I am representing this morning -- do not have any such inherent constitutional power.

That argument, I suggest, does not withstand analysis. Just the single proposition that was cited in the Senate Report in the 1969 report on the proposed legislation was Judge Weinfeld's 1953 decision in the application of United Electrical Workers case, which involved extremely different facts, which involved an accusatory presentment charging that the grand jury had overstepped its proper function in leveling charges of, in effect, perjury without indicting any persons, and which made specific recommendations to a Federal administrative agency about what action it should take, and to Congress about what legislative changes in delicate areas of national policy it should make.

Nothing in the report before the Court this morning goes to that extreme. As I have said, Judge Weinfeld's decision, with all due respect to him, has not been followed by any later Federal decision that I am aware of passing upon the power of regular Federal grand juries to submit reports to the courts that impanel them.

Nothing in the 1970 Organized Crime Control Act was intended to deprive regular Federal grand juries of this power that the courts over the last twenty years have sustained.

Only this morning, Your Honor -- and I apologize to the Court -- we discovered some legislative history on that bill. I have made a copy of that available to Mr. Wilson at the outset and I have copies for other counsel, as well.

In that report, Congressman Poff, who is now, I believe, a Justice of the Supreme Court of Virginia, and who at the time was the Floor manager for that bill, shortly before it was passed by the House and enacted into law, made the following statement which, with your indulgence, I will read to the Court, in explaining the statutory provision to give special grand juries under certain procedures the ability to file reports in this area.

I quote from Volume 116 of the Congressional Record, this is the Daily Copy, Page H-907, October 7, 1970:

"The United States Supreme Court has indicated that Federal grand juries, like their early English

> and Colonial predecessors, may issue reports as well as render indictments. See, for example, Hanna v. Lash, 363 U. S. 420, 449, 1960; Jenkins v. McKeithen, 395 U. S. 411, 430, 1969. But the precise boundaries of that reporting power have not been judicially delineated. For this reason, the authority to issue reports relevant to organized crime investigations has been specifically conferred upon the special grand juries created by this Title. The Committee does not thereby intend to restrict or in any way interfere with the right of regular Federal grand juries to issue reports as recognized by judicial custom and tradition."

We believe that that, Your Honor, should put to one side any implications that might be drawn from the 1970 Organized Crime Control Act.

We think it is clear, then, that the Court has the power to receive the report from this grand jury and to act on its recommendation.

Whether the Court should exercise its discretion to do so in this case is, I believe, the more troublesome issue, although we have made a strong submission stating our position that the Court should exercise its discretion to receive this report and to grant the grand jury's request.

The factors that courts, including the District Court in Maryland and the District Court in Virginia, and the Fifth Circuit, have pointed to concerning the factors that should be considered will all illustrate why the request of this grand jury should be adopted.

In open Court I feel it not appropriate to discuss the specifics of this report, to show how those factors would be advanced by granting the grand jury's request. But the factors include such issues as whether the report is an accusatory document, whether it will circulate charges which have not yet been brought to public attention, whether any persons who may incidentally be mentioned will have no other forums or remedies in which to protect their rights, whether it relates to a matter of profound public importance or is simply a private controversy.

Those are the issues that the courts have looked to. Applying that calculus in this case, Your Honor, I believe there can be no question that the need of the House of Representatives to receive the information that the grand jury has submitted to the Court must be considered of supervening importance.

This, obviously, is the judgment of the grand jury because they submitted the report to the Court.

There is specific precedent. Your Honor may or may not have been aware of this in your hypothetical to Mr. Wilson, but in at least one instance a grand jury has made charges

about a sitting Federal Territorial Judge, who was subject to impeachment by the House of Representatives. The grand jury requested that its charges be sent to the House of Representative of the United States for the House to discharge its constitutional function to determine whether the charges were substantiated. That happened in 1911, and the House of Representatives does today, to the best of our knowledge, in its precedents recognize that as an appropriate measure of cooperation between the branches of government, which are not at war but in cooperation.

The counsel for the President this morning, Mr. St. Clair, has stated that the President has authorized and directed him to make available to the House any of the information that the President has submitted for use by the grand jury, and the question thus arises whether there is any longer any dispute here.

We state that it is still an important question and that there still is a supervening need for the grand jury's request to be observed. As the Court will determine, the President's directive to counsel may not necessarily be coterminal with the content of what the grand jury has asked this Court to transmit. Therefore, that decision does not in any sense of the case moot the issue that we are before the Court here to discuss this morning; nor, I suggest, are the constraints

of Rule 6 of the Federal Rules of Criminal Procedure an obstacle to granting the grand jury's request. That rule codifies the general condition of secrecy of grand jury proceedings. That rule, of course, has never been absolute and there are exceptions that are expressly provided for in the rule and the decisional law recognizes other exceptions.

The learning that can be distilled from the rule and from the case law, including the decisions such as Judge Bryan's decision, passing on almost an identical legal question in much less compelling circumstances, is that whenever the public interest to be served is greater in disclosure than it is in secrecy, the court has the inherent power, which is codified in Rule 6, to make that grand jury material available.

So counsel have focused on the question whether a proceeding before the House Judiciary Committee comes within the ambit of the rule, which talks about releasing grand jury material for cause preliminarily to or in connection with a judicial proceeding.

Several points can be made on that subject, Your Honor. One is that it is unthinkable that in promulgating Rule 6(e) the Supreme Court or Congress -- in not attempting to modify or abrogate it while it lay before Congress prior to its effective date -- intended to cut off the right of a Federal grand jury which has heard evidence on the most profound issue of

Federal concern to make that evidence available through the proper judicial forum to the institution which is explicitly recognized in the Constitution as having primary responsibility for passing on evidence of this sort.

Nothing in the rule can be read to say, for example, that the court has the power to make available grand jury information in an accident case, where someone slipped on the sidewalk, because that would involve a judicial proceeding, but that court and grand jury must stand moot and decline to make available evidence of this sort to the Committee on the Judiciary of the House of Representatives.

Beyond that, Your Honor, as the cases that we have in fact cited in our memorandum, and in fact the citations were included on the list that we did provide to Mr. Wilson, including Doe v. Rosenberry, one of the cases to which he referred this morning, those cases show that what constitutes a judicial proceeding for purposes of Rule 6(e), even assuming that rule is somehow working some constraint or may work a constraint on the Court's power, the scope of the term, judicial proceeding, must be flexibly construed, as it has been.

We have cited to you and to Mr. Wilson a very recent decision of the Court of Appeals for the Seventh Circuit saying that the public interest in disclosing grand jury material was to be advanced by making this information available to a Chicago police disciplinary proceeding, in nature of a judicial

proceeding, although not yet before the courts.

It is hardly imaginable, Your Honor, that Rule 6 allows a grand jury to make available evidence in a disciplinary case of that sort and requires this grand jury in this Court to ignore the evidence that the grand jury suggests is material to the inquiry of the House of Representatives.

Beyond that, there have been some discussions of what constitutes judicial proceedings for one purpose or another. Kilbourn v. Thompson, of course, was a contempt case. We are concerned here about impeachment, which is specifically recognized in Article I of the Constitution.

The House is given the sole power to impeach and the Senate is given the sole power to try impeachment. The grounds for impeachment are the alleged commission of treason, bribery or other high crimes and misdemeanors.

If the House prefers its charges, the charges are tried before the Senate sitting as a Court of Impeachment, on their oaths just as a jury, with the Chief Justice of the United States presiding.

It would be an unreasonable and unrealistic construction of Rule 6(e), we submit, to take the view that within the broad scope that has been given to that rule to make available grand jury material where the over-all public interest is better served by piercing the normal veil of secrecy, that the

impeachment process which is of such tremendous importance to the country may not have access to this material.

Counsel have also raised a question that is of concern to the Court, of concern to the Government, as well as to them and their clients. That is the issue of pretrial publicity and the effect that honoring the grand jury's request may have.

It is important in this context, I believe, to take into account the situation in which we already find ourselves and in which we will be inevitably, irrespective of what happens this morning as a result of these arguments.

There has been already a vast amount of publicity. No one can deny that. The publicity, however, is not of the kind that has been accusatory or inflammatory or one-sided. All of the parties to these disputes have had the opportunity to state their positions and have done so in public forums.

All the Supreme Court has held on the question of pretrial publicity is not that the Court should endeavor to get jurors who are ignorant of what is going on in the world around them. In fact, that might be the worst kind of jury to have in any case, a jury that was so ignorant that it could be found that they never read newspapers or never watched television.

What the Court has said is that the trial judge must try to impanel a jury of persons who can lay aside any impressions they may have from what they have heard outside the courtroom and decide the case only on the facts in court.

Nothing that has gone on so far, Your Honor, we believe, has endangered the ability of this Court at the proper time to select an adequate and impartial jury that can try the Defendants whose counsel are here this morning.

Beyond that, the question of publicity has to some extent been rendered academic because of the President's statement that he will in fact supply all of the evidence to the House Judiciary Committee that has been made available to the grand jury. So that to the extent that anything in the report that this Court has received from the grand jury includes that kind of material, it will be before the House anyway. To the extent there are other items, the Court will be in a position to decide whether they would add so incrementally to the publicity that the Court should deny the grand jury's request to make available what it has heard and what it has received.

We finally would say, Your Honor, that it is premature to consider the speculative possibilities about pretrial publicity as a ground for suppressing this report, which is a communication from the grand jury to the Court with certain recommendations.

As the Court of Appeals for this Circuit has made clear in accord with the decisions of every Circuit, as, indeed, Judge Gagliardi has recognized in the case involving Messrs. Mitchell and Stans, the proper time to assess pretrial publicity is at the impaneling of the petty jury. That is the

only time to determine whether pretrial publicity has become prejudicial and whether that prejudice cannot be cured by some other remedies, such as a continuance or the normal method of scrupulously screening the veniremen to determine whether they can in fact lay aside any impressions they may have.

It is quite premature, on March the 6th, to suppress this report, while the House of Representatives is actively at work considering this question of vital importance to the nation, as counsel for the Committee and the minority and the President have acknowledged today, and to delay these proceedings, this report until the time of trial, which Your Honor has indicated will not begin until September. There is an accommodation between the rights of the Defendants here and the rights of the people speaking through the grand jury and speaking through the House of Representatives.

There is no conflict. There is no inevitable prejudice to the Defendants. If the Court grants the grand jury's request that this material be transmitted to the House forthwith, we submit that the issue of prejudice may well, as the Court of Appeals has said, in Jones v. Gasch, evaporate by the time the Court actually proceeds to impanel a jury for these Defendants.

THE COURT: Thank you, Mr. Lacovara.

In view of the conference we had at the bench a while ago, I am going to recess for lunch until a quarter after two, so you gentlemen can get together in the meantime.

MR. LACOVARA: Thank you, Your Honor.

(Whereupon at 12:40 p.m., the hearing was recessed pursuant to reconvening at 2:15 p.m. of the same day.)

Sokal follows

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AFTERNOON SESSION -- 2:15 p.m.

THE COURT: All right, has anyone prepared anything for the Court?

MR. STEIN: If the Court please, I believe there are independent statements that have been prepared. I can give the Court mine if Your Honor pleases.

As an attorney for Kenneth W. Parkensen, I do not choose to inspect the Grand Jury material and I object to any procedure which would cause or permit the contents to become public.

Thank you, Your Honor.

THE COURT: That is your statement, correct?

MR. STEIN: Yes, sir.

MR. WILSON: Your Honor, I hope that you will accept my assurances that in our failure to prepare something is not intended to be a discourtesy to the Court. We want to entertain a quite technical position.

THE COURT: I understand your position.

Mr. Green?

MR. GREEN: Your Honor, I represent --

THE COURT: -- Suppose you approach the lectern so we can all hear you. The question is whether or not they want to inspect the two-page memorandum or order.

MR. GREEN: On behalf of Defendant Mardian, we have no desire to inspect the memorandum and we object to its release

on grounds of pretrial publicity.

THE COURT: You know the Court has offered to allow you to inspect it, that is correct, isn't it?

MR. GREEN: I understand that, Your Honor.

THE COURT: All right. Anybody else?

MR. DICKSTEIN: Sidney Dickstein on behalf of defendant Charles W. Colson.

Our position with respect to this two-page document which has been characterized as a transmittal letter is, we have no desire to see the document independently of the material which accompanied it.

As we have said before, we do not believe that we can be called upon to formulate a position with respect to dissemination or disclosure of this document or its accompanying material to anyone under circumstances which we have not seen it or the material, but the prosecution and the Court have.

THE COURT: Thank you.

Mr. Bundley?

MR. BUNDLEY: For Mr. Mitchell, to restate it briefly, we would urge if there is anything in it that pertains to him that it be expunged. If there is any material in the briefcases that would fall within Brady material, I feel that should be held for us.

Other than that, I don't think there is any materiality in my review of the document or contents of the suit cases.

Thank you, Your Honor.

THE COURT: Anybody else representing the defendants?

MR. BRAY: Your Honor, I am John Bray for Gordon Strachan.

Not to sound a discordant note, but an independent position of counsel for Gordon Strachan is he objects to any publication or disclosure of the matters before the Grand Jury other than legally permissible disclosure to defense counsel, himself, meaning me, personally. Such objection extends to the rumored two-page report, to the contents of the Special Prosecutor's briefcase and any other Grand Jury reports, communications, minutes or exhibits.

The objection to disclosure to the House of Representatives or anyone else because we previously expressed objections relating to Grand Jury secrecy and adverse publicity.

Counsel, myself, consents to private inspection of the two-page report only to inform myself and the Court as an advocate before the Courtfor the purpose of making more specific objections. I specifically should note I could not even consent to disclosure of the two-page report to other counsel for the defense.

THE COURT: Do you wish to see the two-page report?

MR. BRAY: Yes, Your Honor.

THE COURT: All right, with this provision: You are not to disclose any part or all of the contents of that two-page

report to anyone but yourself, of course, you understand.

MR. BRAY: Pardon me, Your Honor. We mentioned yesterday one caveat.

THE COURT: The one exception was your client.

MR. BRAY: That is correct.

THE COURT: Warn him, tell him he is not to disclose it to anyone, any part or all of it. You will have a right to see that report. All right.

Anybody else?

MR. LACOVARA: Your Honor, for the Government, so the record will be clear, it is the Government's position on behalf of the Grand Jury that we have no objection if the Court wishes to release that two-page memorandum that has been referred to.

Furthermore, we have no objection to the Court's filing publicly the memorandum of law that was submitted yesterday or to the Court's making it available to counsel under seal. We have copies available today for service on counsel if they wish to receive it.

MR. WILSON: Your Honor, may I supplement my remarks?

THE COURT: Yes, sir.

MR. WILSON: The response which I made to your inquiry as to whether we had anything was intended to be limited to a courteous response that we didn't prepare anything. I did not go any further and now want to go further. I realize what everybody else is covering and I want to cover it, too.

We don't want to see either paper, either the suit case or the document separately or together. There are no qualifications on our polite declaration.

Since I walked around here, I have rebuttal argument to make. Are you ready to hear it?

THE COURT: Yes, I would like to hear it.

MR. WILSON: I want to begin by discussing the argument of Mr. Lacovara. He is a good lawyer, he made a good argument, it's the first time I heard him make an argument and I know what we are in for now from here on out throughout the whole trial; but I want to work him over just a little, if I may.

I think he said that Wainfeld had not been cited with approval by any court, is that not what you said, Mr. Lacovara?

MR. LACOVARA: I believe the record will show that I said his decision had not been followed and other courts have allowed Grand Juries to submit and file reports.

MR. WILSON: In the Kent State case which we cited, Hammond v. Brown, it is relied upon by the District Judge -- that is in our letter, Your Honor -- on Page 345 of 23 F. Supp. he cites with approval. The Circuit Court of Appeals for the Sixth Circuit in affirming it in 450 F.2d approves the lower court's decision in its entirety.

I could continue on with a number of other cases, it may be that Mr. Lacovara and I would end up matching cases, one-for-one, but at least I can show some cases and I hope as many

as he could that Judge Weinfeld, who as we all know is one of the best District Judges in this country, was followed.

Now, if I wander away from Mr. Lacovara for a moment and address the Court some more because that book happened to be next to pick up, you called my attention to the fact that found in New York Judge Weinfeld/in 14 instances reports had been made.

I would like to have the record show what I am sure that has been evident to all counsel, on Page 869 of 111 F.Supp. Judge Weinfeld says:

> "The United States Attorney refers to the fact that reports in this District have been accepted through the years without protest. He points to some 14 in number filed in the past 16 years, but they have been received without challenge does not import judicial sanction or authority and the Grand Jury issued them. Whether individuals were named therein or whether they related to general conditions is not stated. The most that can be said is that they were not challenged and were permitted to go by default."

Next, coming back to my astute friend, Mr. Lacovara, I want to discuss with him Judge Poff's remarks on the floor of the House. I don't know whether Mr. Lacovara got this from a Congressional Record so late that he wasn't able to read the

two cases that Judge Poff relies upon but I have got them here.

Let me tell you what Judge Poff says these cases hold. This is what Mr. Lacovara read:

> "Whereas the release of reports by grand jurors at the end of their terms is common practice in some districts. The matter rests upon precedent and the court's discretion rather than upon statute. The United States Supreme Court has indicated that Federal Grand Juries like their early English and colonial predecessors may issue reports as well as render indictments. See Hannah v. Larche, and Jenkins v. McKeef (phonetic spelling). But the precise boundaries of the reporting power have not been judicially delineated."

I allow a lot of liberties to be taken with advocacy because I take them myself, but these two cases are civil rights cases in which the issue was as to what protection a witness would have in the case of an investigation, whether he could have counsel present, whether he could be cross-examined.

The Supreme Court in going back to the traditional practice of what they say is the oldest and perhaps best known of all investigative bodies, the Grand Jury, and it goes on for half a dozen lines and then says:

> "Undoubtedly the procedural rights claimed by the

respondents have not been extended to Grand Jury hearings because of disruptive influence their injection would have on the proceedings and also because the Grand Jury merely investigates and reports."

This is the only thing it said. Now even as enthusiastic an advocate that I am, Your Honor, I wouldn't stretch that to mean that they are talking about reports in the sense in which we are making it. This is a generalization and that is all it said upon the subject upon which Judge Poff draws this unlicensed conclusion when he was maneuvering the bill through the House. That case is in 363 U.S. Thirty-two volumes later the Supreme Court again had the same similar questions, civil rights case, and one line is given:

"As the Court noted in Hannah the Grand Jury merely investigates and reports."

There is absolutely no enlightenment upon this problem which you have here today.

Now as far as the Gaylor case is concerned I don't know why I have to say anything more on that. You laid Mr. Lacovara to rest with the one sentence you read in Gaylor. It no more stands for the proposition that a Grand Jury of the District of Columbia may make a report as such than it would the most absurdthing you could ever think of. I don't have to argue this with you. I always learned when the Court is with

you don't talk.

Now, Mr. Lacovara also spoke about the Fifth Circuit case, the Cox case. Everything he said in the Cox case is dictum. There isn't a word in that case that is controlling in this situation whatsoever. As far as the state prosecutions being regarded as judicial proceedings for the purpose of Rule 6(e). There is half a dozen cases on this point make sense. It doesn't particularly have to be a Federal proceeding, as long as it is a judicial proceeding, that is all that it is.

Mr. Lacovara tried to raise the proceeding of impeachment to something that has none of the attributes of anything else or lacks some of the attributes that other things have. The fact that the Chief Justice presides over the impeachment in no way makes this a judicial proceeding. One has only to read Madison's Minutes to see how this came about.

10) Madison was scared to death of having the Senate sit in judgment of the President. Your Honor knows that, you smile, you have been doing the same reading I have been doing. And they reached out to find somebody who would be unmotivated by political considerations. And after several attempts they hit upon the Chief Justice, which was a good idea. But it was in no way intended to infiltrate judicial characterization into impeachment proceedings.

Now about a contempt proceeding in the House where the body sits as a committee of the whole to pass upon the contempt?

Is this a judicial proceeding or is this a legislative proceeding? There isn't the slightest doubt about it, cases say this is a legislative proceeding.

At the opening I talked about the risk of not getting a fair trial, a thing that Your Honor is very apprehensive of, want to guard against the possibility of the opposite occurring. Citations of authority, Supreme Court or otherwise do not help me muchon this point. These things have to be decided ad hoc. You never have the same situation twice. The mere fact that a juror may be able to render a verdict according to the facts as he hears them and the law as the Court gives them which is boilerplate question and to which 99 times out of a hundred you get the answer, yes. That might mean one thing in the context of an ordinary criminal case, could mean an entirely different thing in the content of this highly publicized case. I don't think there is a person in this room who will not indulge in the most extreme hyperbole in saying that the publicity in this case has exceeded anything that ever happened since the world began -- unless it was the creation of the earth on the first seven days, I am not sure. I sound like Senator Irvin and I don't want to.

So I am not going to wear Your Honor with more about pretrial publicity from the point of Mr. Lacovara, I want to pay my respects to the gentleman from the Hill. I am glad they came. They supplied me with a number of thoughts I want to talk

about.

Mr. Dear is a forthright individual, a fine lawyer, an honorable man, cannot give you an assurance that there won't be a leak. This is understandable.

Now we saw it with the Irvin Committee and which I feel that some members of that Committee conscientiously meant what they said, that there were not to be leaks. But this information moves into the offices of the members of Congress who are sitting on the Committee and try as they may there are leaks. And for anybody to stand up here and say we are going to limit it to this, the five named individuals, I don't question his good faith, I question his experience with reality.

Now even on these ground rules that have been printed here for this Committee there is a proviso and that is a majority of the Committee may turn it loose. They may turn it loose at any time. We have nothing there which says they will turn it loose after the time has passed when these defendants may be prejudiced.

You are faced here, Your Honor, with a frank statement from a representative of the Committee today, he doesn't know when this stuff might leak.

These phrases I wrote down: "The staff will get only if necessary." You can't tell me these two gentlemen, as smart as they are, are going to do this job alone. Within 48 hours 10 or 20 human beings on the Hill will know the contents of this

suit case. And I am not saying anything wrong with it, I am just saying it can't be helped in a case of this size.

They have to have people running down points and knowing what they are running down and they can't be given a sentence in the abstract, they have got to be given the text. And for Mr. Dear to say in all good faith that the staff is going to learn it only if necessary just can't happen, that is all.

Then I wrote down his precise words: "I cannot guarantee that it will not leak out."

I think Mr. Dear put Your Honor in a terrific spot when he told you that. You are now charged with the representation of the House of Representatives Committee that there is a possibility -- let me state it at the lowest rung of the ladder -- I don't call it probability because I don't want to exagerate, there is a possibility that this will leak. We needn't talk about possibilities if it leaks it won't hurt us. It is bound to hurt us.

And if we are not doing anything else today, if we're not convincing Your Honor today, if Your Honor rules against us, we are making a record that if this does leak and it does prejudice us, the trial Judge was warned of this the moment when it could have been avoided.

So much for Mr. Dear. I deal with him on the basis of concessions.

I want to deal with Mr. Jenner on the basis of a very

erudite yet confusing argument. He has built an impeachment process up proceeding up to the point where outcomes everything. I sat and waited for him to say he could suspend the due process clause. He hasn't found it necessary yet to do that but with his skill I predict some day we will hear that other provisions of the Constitution have been suspended in favor of this very high most favored, if I could use that term, provision of the Constitution involving impeachment. He knows better than I do because he has been on the Committee for the Federal Rules, he knows that the Federal Rules have a force and effect of the law.

He is asking Your Honor today to rule that in an impeachment case you don't have to pay any attention to this Rule 6(e), is what he is saying. He is saying this proceeding has come to the point where statutory objections enacted pursuant to delagation of Congress are to be thrown to the wind to accomplish this purpose.

I hope, and I am not speaking about impeachment, I am hoping that we never come to the point where so-called exigencies of the situation are so prevailing and so overwhelming that they will override statute and constitutional rights of defendants in a criminal case.

THE COURT: Let me interrupt you a second. You have been speaking on behalf of your clients. What do you think of the position taken at the request of the President by Mr. St. Clair, his lawyer, the position he took here this

morning? What do you have to say about that? Don't you think the President has a lot at stake in this matter? He doesn't have a serious objection, it appears to me, to turning this over whatever I have to the Committee and he is the one apparently primarily involved in this so-called impeachment move.

MR. WILSON: Your Honor, you put me on the spot.

11) THE COURT: I put you on a good spot.

MR. WILSON: You know it is not the first time I have been on the spot.

The answer is the same one I made to you in chambers on Tuesday. I don't care what the position of the White House is, I am not working for the White House, I am working for Haldeman and Ehrlichman and if I think that is in their best interests Mr. St. Clair can do what he chooses without my bowing to him and certainly he isn't going to bow to me as he indicated on several occasions already.

THE COURT: I am not criticizing you, I am just trying to get you thinking about his position.

MR. WILSON: That is all right, that is somebody else's problem not mine.

Finally, I have got to work Mr. Jenner over again. This idea that matters before a Grand Jury don't include this hunk of documents. Now Tom Green has answered this and I hope Tom will forgive me if I put a little icing on the cake.

What are matters before the Grand Jury? When a man talks? When a man takes the oath? When a man goes to lunch? If a document is shown him and is it suggested that the prosecutor is using the Grand Jury process here to produce documents that never get before the Grand Jury? That went out of vogue about the year you and I were Assistant District Attorneys, we had to cut it out.

So you can presume that these documents have been before the Grand Jury.

I tell you what I would like to read, I would like to read the colloquy of the transcript between the prosecuters and the Grand Jury when they made up this report and when it selected the documents. Can we see that?

THE COURT: I don't think I can answer that question.

MR. WILSON: You feel like I did about the White House.

THE COURT: You know, I think you and I learned this many years ago, Mr. Wilson, the old saying is get the facts and the law will take care of itself.

MR. WILSON: Well I also heard a lawyer say: To heck with the law, give me two good witnesses. Isn't that what he used to say?

THE COURT: I think so.

MR. WILSON: I can't imagine that Mr. Jenner is really too serious. He is an advocate, he is a good lawyer, but when he drags in the idea that documents before a Grand Jury are not

matters I can't even take him seriously.

I think I rambled on and Your Honor is awfully patient with me as you always are, but I may have another case or two I would like to mention before I sit down.

You know, Frank and I watch everything that goes on in the courtroom that we can. You had 433 F.2d up on the bench this morning. We wondered why. The only thing we could find in there that is relevant is U.S. v. Howard, Page 1. Did I pick the right one?

THE COURT: You are the one that is speaking, I am listening.

MR. WILSON: The word impeachment is used in there but the word impeachment is the impeachment of witnesses not this impeachment proceeding. I don't believe I had to mention that but at least I want you to know we did our homework.

Finally, addressing Your Honor, you spoke about the IRS getting documents from the Grand Jury. I guess you had in mind in re April 1956 Term Grand Jury 239 F.2d, 263. I will only read you one head note:

"Where a Grand Jury turned over to third persons including Treasury agents taxpayers' records and accounts for the sole purpose of examination and report to the Grand Jury the taxpayers were required in criminal prosecutions based upon indictments to await indictments before they can obtain a hearing

in the trial court on alleged violations of their constitutional rights. For use in civil proceedings of taxpayers' records and documents obtained by a Grand Jury subpoena would violate Fourth and Fifth Amendments."

If that would violate the Fourth and Fifth Amendments in a civil case, it violates the Fourth and Fifth Amendments in this case.

Thank you, Your Honor.

THE COURT: Anybody else want to say anything?

Well, the Court wishes to congratulate each of you attorneys on all sides of this case. I know all of you have done your homework and done it well. It is always a pleasure to listen to competent, experienced attorneys.

The Court will take this matter under advisement.

(Adjourned at 2:50 p.m.)

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CERTIFICATE OF REPORTER

It is certified the foregoing is the official transcript of proceedings indicated.

Nicholas Sokal
Official Reporter